No. 83-1992

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY EUGENE CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes involving the misuse of his judicial authority.

2. Whether petitioner's claim of "selective" or "vindictive" prosecution is appealable before trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 727 F.2d 842.

JURISDICTION

The judgment of the court of appeals (Pet. App. A41-A42) was entered on March 5, 1984. On April 27, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to June 3, 1984 (Sunday). The petition was filed on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 8, 1983, a seven-count indictment (Pet. App. A43-A54) was returned against petitioner in the United States District Court for the District of Nevada. Count One of the indictment charged that petitioner, a United States District Judge for the District of Nevada,

solicited and received a bribe from Joseph Conforte, a Nevada brothel owner, in return for favorable disposition of motions in a pending case, in violation of 18 U.S.C. 201(c). Count Two charged that petitioner caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte, in violation of 18 U.S.C. 1343. The scheme to defraud allegedly involved petitioner's false representation that he could secure the reversal of the criminal convictions of Joseph and Sally Conforte by bribing one or more judges of the United States Court of Appeals for the Ninth Circuit in return for $100,000 ($55,000 of which Conforte allegedly paid). Pet. App. A1-A2, A44-A48. Count Three charged that petitioner obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating petitioner, in violation of 18 U.S.C. 1503. Counts Four through Six charged petitioner with failing to report income on his 1978, 1979, and 1980 tax returns, in violation of 26 U.S.C. 7206(1). Count Seven, unrelated to the others, charged that petitioner knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee, in violation of 18 U.S.C. 1001. Pet. App. A3 n.1.

2. Petitioner moved to quash the indictment and to dismiss the proceedings against him on the ground that the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through impeachment. After the district court denied the motion (Pet. App. A40), petitioner filed an interlocutory appeal.[1]

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[1]Petitioner also applied for writs of mandamus and prohibition to stay the trial court from proceeding until the court of appeals resolved the merits of his interlocutory appeal (Pet. App. A4-A5). The court of appeals declined, without prejudice, to stay the district court's pretrial proceedings scheduled for February 21, 1984 (Pet. App. A5). As part of its decision on the merits, the court of appeals denied as moot

Finding that it had jurisdiction to hear an interlocutory appeal on petitioner's claim that a criminal proceeding could not be brought without a prior impeachment (Pet. App. A5), the court of appeals affirmed the district court's denial of the motion to quash the indictment (*id.* at A9-A29). The court of appeals also ruled that petitioner's claim of "vindictive" or "selective" prosecution was not appealable prior to trial (*id.* at A30-A31).

Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict. On July 5, 1984, the district court, on the government's motion, dismissed Counts One through Four of the indictment. The retrial on the remaining counts began on July 31, 1984.

ARGUMENT

1. Petitioner contends (Pet. 8-13, 20-33) that the Constitution requires that he be removed from office through the impeachment process before he can be subjected to a criminal prosecution. This contention is without merit.

While the Constitution provides life tenure for judges (Art. III, § 1), which can be taken away only through the impeachment process (Art. II, § 4), nothing in the Constitution purports to confer upon a judge any immunity from criminal prosecution. Nor can it be said that the institution of criminal proceedings interferes in any way with Congress's exclusive power to impeach. Cf. *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974); *Burton* v. *United States*,

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petitioner's renewed motion to stay proceedings in the district court (Pet. App. A5, A31-A39). On March 12, 1984, Justice Rehnquist denied petitioner's application for a stay of those proceedings in order to permit this Court to review prior to trial the decision of the court of appeals, which was rendered on March 5, 1984. No. A-725. The stay application was resubmitted to Justice White and referred by him to the full Court, which denied it on March 14, 1984.

202 U.S. 344, 369 (1906) (members of Congress). See also *Chandler* v. *Judicial Council*, 398 U.S. 74, 141-142 (1970) (Black, J., dissenting). In addition to the absence of textual support for his extraordinary claim of judicial immunity from prosecution, petitioner points to no relevant decisional or other authority for support.[2] Thus, it is hardly surprising that the other courts of appeals that have considered this question have flatly rejected petitioner's contention and that this Court has denied certiorari in those cases. See *United States* v. *Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974). There is no reason for a different result here.[3]

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[2]The decision of the court of appeals does not, as petitioner urges (Pet. 26-33), conflict with the principles of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), or *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). The court of appeals correctly observed that "[b]oth cases are inapposite and of no aid to [petitioner]" (Pet. App. A28-A29 n.6). *Northern Pipeline* held invalid the 1978 Bankruptcy Act because it conferred Article III powers on Article I judges. It certainly did not suggest that Article III judges are immune from prosecution. *Nixon* addressed the question of immunity from civil liability for officials acting in their official capacity. The rationale for such immunity plainly does not extend to criminal conduct. See *United States* v. *Gillock*, 445 U.S. 360, 372-373 (1980); *O'Shea* v. *Littleton*, 414 U.S. at 503; see also *United States* v. *Brewster*, 408 U.S. 501, 516-520 (1972); *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

[3]The flaws in petitioner's constitutional claim are discussed in more detail in the government's Brief in Opposition in *Hastings*, a copy of which has been provided to petitioner.

Petitioner also urges this Court (Pet. 20-26) to exercise its supervisory power to establish a uniform procedure among the courts of appeals for handling prosecutions of federal judges with minimum disruption. Fortunately, there have been very few criminal prosecutions of active federal judges. See *Hastings*, 681 F.2d at 709 n.7. Petitioner offers no evidence that the procedures used in these cases so lacked uniformity or were so unduly disruptive as to require the exercise of this Court's supervisory power.

2. Petitioner apparently also argues (Pet. i, 17-20) that the prosecutor has selected him for prosecution for impermissible reasons relating to his judicial decisions in government cases. The court of appeals correctly held (Pet. App. A30-A31) that this type of claim of "vindictive" or "selective" prosecution is not appealable before trial. As Justice Rehnquist observed in his opinion denying petitioner's request for a stay, his claim is squarely governed by *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), which held that such claims do not fall within the "collateral order" doctrine. Like a speedy trial claim (*United States* v. *MacDonald*, 435 U.S. 850 (1978)), and unlike a double jeopardy claim (*Abney* v. *United States*, 431 U.S. 651 (1977)) or petitioner's own erroneous claim that the Constitution prohibits the trial of an active judge prior to impeachment, petitioner's "vindictive prosecution" claim does not encompass a right not to be tried at all. Petitioner advances no reason why he is prejudiced if this claim cannot be raised after trial or why, as a judge, he should be excepted from the general holding of *Hollywood Motor Car* applicable to other individuals. In any event, in light of the commencement of petitioner's retrial on July 31, 1984, his claim of a right of interlocutory appeal now appears to be moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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